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Advice File

UNITED STATES GOVERNMENT
National Labor Relations Board

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Memorandum

TO Bernard Gottfried, Regional Director
Region 7

DATE June 2, 1986

FROM Harold J. Datz, Associate General Counsel
Division of Advice

SUBJECT General Motors Corp., Saturn Corp.
Case 7-CA-24872

International Union, United Automobile,
Aerospace and Agricultural Implement
Workers of America, UAW
Case 7-CB-6582

133-8733
177-1642
220-2587-2500
518-4040-0100
518-4040-1700
518-4040-1716
518-4050
524-5090-3380
530-4825-5000
530-4850-7500
530-6050-0825-3300
530-6050-5025
530-8090-8000
536-2545-1500
548-6030-3330
548-6030-3340
548-6030-6725-1700

These cases were submitted for advice as to: (1) whether the charges are barred by Section 10(b); (2) whether General Motors Corp. (GM) and the United Auto Workers (UAW) could lawfully negotiate an agreement granting preference for employment at GM's new Saturn facility to current and laid off GM employees; and (3) whether GM could lawfully extend, and the UAW lawfully accept, recognition at the Saturn facility, prior to the time any employees are actually transferred and/or hired.

FACTS

On November 9, 1983, GM announced its Project Saturn. Later that year, GM issued a joint press release with the UAW announcing "plans for a Joint Study Center aimed at achieving an unprecedented union-management partnership in the development and manufacture of a small car." In January, 1984, the monthly issue of "GM Today" announced "General Motors' plan to domestically build a new subcompact car [that would] include full employe participation and enhanced job security under terms of a partnership between the corporation and the United Auto Workers (UAW)." On September 21, 1984, GM and the UAW reached agreement on a national contract (National Agreement) which included the development of a JOBS (Job Opportunity Bank-Security) program to protect employees from layoff as a result of the introduction of technology and outsourcing, and which contained Document No. 10 on Job Security. That document made specific reference to the Saturn project as one of GM's efforts "to remain a viable domestic enterprise."

On January 8, 1985, 1/ the GM Board of Directors approved the formation of the Saturn Corporation as a wholly-owned subsidiary of GM to assume the obligations and goals of Project Saturn. 2/ On February 20, Saturn Corp. was incorporated. On July 23, Saturn Corp. entered into a Memorandum of Agreement (the Saturn Agreement) with the UAW setting forth certain of the terms and conditions of employment at the future Saturn facility. The Saturn Agreement contains a recognition clause which provides inter alia:

> The success of Saturn is fully dependent on its people. Hiring and retention of experienced, dedicated personnel is essential. It is recognized that the best source of such trained automotive workers is found in the existing GM-UAW workforce. Therefore, to insure a fully qualified workforce, a majority of the full initial complement of operating and skilled technicians in Saturn will come from GM-UAW units throughout the United States.
>
> During the period of organization and start-up, certain particular skilled personnel will be required, including operating technicians and skilled technicians, virtually all of whom will come from UAW-represented units; therefore, the UAW is recognized as the bargaining agent for the operating and skilled technicians in the Saturn manufacturing complex.

The Saturn Agreement sets forth a wage scale, holidays, vacation, and working hours, and provides for job security dependent upon an employee's length of employment (including seniority accumulated at other GM-UAW units). The Agreement requires union membership "to the extent permitted by law." The Agreement contains neither an effective date nor a termination date.

On July 29, GM announced the decision to construct the Saturn facility in Spring Hill, Tennessee. The projected ultimate work force, to be reached 3 to 3 1/2 years after the plant opens, is 6,000. The "full initial complement," to be reached approximately two years after the plant opens, is projected to be one shift of 2,500 employees. It is anticipated that a start-up workforce of 200 will be hired in the near future.

ACTION

We concluded that the charges in the instant cases are not barred by Section 10(b). We further concluded, however, that the charges should be dismissed, absent withdrawal.

1/ All dates hereinafter are in 1985, unless otherwise noted.

2/ Although Saturn is a separate corporation, it is clear and uncontested that GM and Saturn constitute a single employer.

A. Section 10(b)

In United States Postal Service Marina Center, 271 NLRB 397, 400 (1984), the Board concluded that the Section 10(b) period begins to run when there is "unequivocal notice" of a decision alleged to be an unfair labor practice, rather than the date on which that decision is implemented. Hence, the 10(b) issue in this case turns on when there was "unequivocal notice" of the decision to grant "preferential hire" rights and recognition to the UAW.

In our view, it was not until July 23 that there was "unequivocal notice" that GM would grant an employment preference to employees represented by the UAW and would grant recognition to the UAW. The UAW's argument concerning Section 10(b) relies on the 1983 GM-UAW press releases concerning Project Saturn. However, these releases do not say anything about hiring practices and recognition. The UAW also relies on the UAW-GM Report published in September 1984 describing the terms of the new National Agreement. This Report contained an article concerning a $100 million New Venture Fund established by the National Agreement as a joint effort by GM and the UAW to develop new business ventures and to provide employment opportunities for UAW-represented employees of GM. The Report also said that "to the extent permitted by law, the corporation [would] recognize the UAW" at such business ventures. The Saturn Project was not expressly discussed in this context, although, as noted, it was mentioned in Document No. 10 of the National Agreement concerning job security. Assuming arguendo that these documents reasonably implied that preferential hire and recognition would be accorded at Saturn, it is clear that these documents were distributed only to the UAW membership and GM personnel. There is no suggestion that they were generally available to the public. Consequently, the Charging Party in the instant cases, who has no connection with either the UAW or GM, could not be charged with knowledge of these documents.

In sum, the Charging Party was not clearly aware of any agreements regarding preferential hire and recognition until the Saturn Agreement announcement of July 1985. Accordingly, the August 7 charges were filed within the Section 10(b) period.

B. The Obligation to Bargain.

Before discussing the precise issues in the instant case, it is appropriate to note, by way of background, that GM and the UAW have had a long and productive collective bargaining relationship. In any collective bargaining relationship, there is an obligation to bargain over the effects of a decision that could have a significant adverse impact on the unit employees. First National Maintenance Corp. v. NLRB, 452 U.S. 666, 681-82 (1981); Otis Elevator Company, 269 NLRB 891 (1964). 3/ Typically, the duty to bargain

3/ See also NLRB v. Transmarine Navigation Corp., 380 F.2d 933, 939 and cases cited therein (9th Cir. 1967); Royal Typewriter Co., 209 NLRB 1006, 1015 n. 21 (1974), enfd. 533 F.2d 1030 (8th Cir. 1976); General Cinema Corp., 214 NLRB 1074, 1076 n. 12 (1974).

concerning "effects" arises in a situation where an employer's decision will result in a loss of jobs. Thus, for example, when an employer decides to relocate, it is obligated, at the very least, to bargain about the possibility of employee transfers to the new operation, including the possibility of preferential hiring rights there. See, e.g., Fraser & Johnston Co., 189 NLRB 142, 143, 151 (1971), enfd. 469 F.2d 1259, 1262-63 (9th Cir. 1972); Cooper Thermometer Co., 160 NLRB 1902, 1912 (1966), enfd. 376 F.2d 684, 687-88 (2d Cir. 1967).

This duty is not limited to relocations. Indeed, any management action which could result in layoffs will require bargaining over the "effects" of the decision, even if the decision itself does not require bargaining. 4/ Both GM and the UAW have long recognized their obligations to bargain about the impact of management decisions on unit employees. Their current contract contains many of the fruits of this collective bargaining. One provision gives an employment preference to laid-off GM employees for 24 months after production in a new plant begins (¶95); another provision acknowledges transfer rights with full seniority, even for permanently laid off employees, in situations where GM transfers major operations between plants (¶96, Document No. 2C); and a Memorandum of Understanding sets up a Job Opportunity Bank Security Program (JOBS Program) (Document No. 10, Appendix K). The fundamental premise of the JOBS program is that no GM employee represented by the UAW with one or more years of seniority will be laid off as a result of the introduction of technology, outsourcing, or negotiated productivity improvements. The JOBS Program is designed to place, and re-train if necessary, any GM-UAW unit employee who is displaced. In addition, the JOBS Program obligates GM to continue paying eligible employees who have minimum levels of seniority and who have been laid off as a result of certain changes in operation. These provisions represent a clear commitment by GM, through bargaining with the UAW, to avoid job loss in the event of changes in the operation of the enterprise. There is no allegation that any of these commitments is illegal.

C. Issues Raised by the Instant Charges.

1. Job Preference

Technically the charges in the instant cases allege only that the recognition is premature and therefore unlawful. However, the validity of the decision regarding recognition turns to some extent upon the validity of the agreement to give preferential hiring rights to current GM employees who are represented by the UAW. In addition, the Charging Party has made it clear that

4/ First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

it is attacking the preferential hiring agreement because it allegedly discriminates against employees who are not employed now by GM in units represented by the UAW. In the Charging Party's view, this preference unlawfully encourages membership in the UAW.

We have concluded that the preferential hire agreement is the product of legally required "effects" bargaining over an employer decision which has potential adverse consequences for unit employees, and that it does not discriminate unlawfully against employees. As discussed above, the case law requires that an employer bargain about the effects of a management decision that could affect the jobs of unit employees. Further, as discussed above, where the management decision involves the construction of a new facility, the bargaining will often involve the granting of preferential hiring rights at that new facility. It is clear that the agreement granting preferential hire rights at the Saturn facility to present and laid-off GM employees in units represented by the UAW was a legitimate product of such "effects" bargaining. See Metropolitan Teletronics Corp., 279 NLRB No. 134, slip op. at p. 9 (1986).

In the instant case, GM made a decision to construct a new facility. Clearly that decision can have a major impact on current unit employees. According to GM, the Saturn project is the prototype for the future of General Motors and, possibly, the prototype for the future of the small car manufacturing industry in America. If the Saturn project succeeds, there is at least a reasonable likelihood that GM's other small car facilities will be closed or reduced; some may be converted to similar, Saturn-type facilities. Alternatively, if the Saturn project fails, there is a distinct possibility that GM will close its small car manufacturing facilities in the U.S. and move this manufacturing arm abroad. Under either scenario, there is the potential for significant job loss for UAW-represented employees. Both GM and the UAW recognized that the Saturn Project represented a management decision concerning the future of the company, and that this decision could adversely and directly affect unit employees. Accordingly, it was clear that the National Labor Relations Act obligated the parties to bargain about the effects of that decision and about granting preferential hiring rights at the new facility. In accordance with the law, and with GM's commitments, the parties have bargained and reached an agreement. Thus, that agreement is the lawful product of required bargaining.

We recognize that the preference given to GM employees represented by the UAW may have some negative impact on the employment prospects of others. However, this fact does not render this employment preference unlawful. In situations where a union obtains a benefit for employees it represents, that gain may encourage other employees to join the union. The Supreme Court has held that this is not the kind of encouragement which the Act prohibits. Local 357 Teamsters v. NLRB, 365 U.S. 667, 675-76 (1961); Radio Officers Union v. NLRB, 347 U.S. 17, 42-43 (1954). The Charging Party further argues that GM has

discriminated against those who are not members of the UAW. However, the evidence does not establish such discrimination. If an employee is in a unit of employees represented by the UAW, that employee obtains the preference, irrespective of whether he/she is actually a member of the Union. 5/ Conversely, if an employee is a UAW member, and yet not in a represented unit, he/she would not receive the benefit.

Further, even though GM's conduct does distinguish between employees based on whether they have worked for GM in a unit represented by the UAW that does not necessarily make it unlawful. Although GM employees represented by UAW are given a preference, they need not become or remain members of UAW to work at Saturn. By its very terms, the Saturn Agreement's union security clause is enforceable only to the extent permitted by law. Tennessee is a right-to-work state, and thus union security cannot be enforced there. There is no evidence whatsoever that GM or the UAW intend to flout state laws. To the contrary, these parties have conformed their practice to such requirements. In this regard, we note that the GM-UAW National Agreement, which contains an identical union security clause, covers employees in many states, some of which are right-to-work states. There is no evidence suggesting that the parties have attempted to apply the clause in right-to-work states. Finally, it is not a foregone conclusion that employees will be actually represented by the UAW at the Saturn plant. As discussed infra, if the UAW does not obtain the free support of a majority of Saturn unit employees, the UAW will not be their collective bargaining representative.

It is also clear that the Employer has a legitimate and substantial business justification for its conduct. 6/ That is, GM has a need for a ready supply of skilled employees to assure the success of this costly new undertaking, and its current production employees, almost all of whom are represented by the UAW, can best fill that need. Finally, and with particular respect to legitimacy, the Employer's conduct was a consequence of lawful, required bargaining about "effects".

The instant case is clearly different from other cases where a hiring preference has been concerned. See, e.g., IATSE Local 659 (MPO-TV of California), 197 NLRB 1187, 1189 (1972), enfd. 477 F.2d 450 (D.C. Cir. 1973), cert. denied 414 U.S. 1159 (1974); New York Typographical Union No. 6 (Royal Composing Room), 242 NLRB 378, 379 (1979), enf. denied 632 F.2d 171 (2d Cir. 1980). In those cases, the contracts provided that, in referring applicants for employment pursuant to an exclusive hiring hall agreement, the unions would give preference to employees having prior work experience with employers

5/ There are a number of UAW-represented GM plants in right-to-work states. Further, even in the other states, full membership cannot be required as a condition of employment. NLRB v. General Motors Corp., 373 U.S. 734 (1963). Thus, an employee can be represented by the UAW and eligible for the benefits of the Saturn Agreement and yet not be a member of the UAW.

6/ See NLRB V. Great Dane Trailers, 388 U.S. 26, 34 (1967).

signatory to the contracts. Those signatories included members of the multiemployer bargaining unit as well as "me-too" signers that did not belong to the unit. The Board concluded that, to the extent the referral preference turned on experience gained by working for a "me-too" signer outside the unit, it was unlawful because it thereby rewarded employees who chose to work in union-represented units and penalized those who did not. Notably, the preference was not invalidated insofar as it covered actual members of the multiemployer bargaining unit.

In the instant case, GM is granting a preference to its own employees. Employees are being transferred from one GM facility to another; they are not being newly hired. The preference they receive is based on their status as GM employees; it is not, as in the cases cited, based on experience with a wholly unrelated company merely because that company is signatory to a union contract. Stated simply, the Board cases do not prohibit an employer from preferring its own employees over "the rest of the world." 7/

Concededly, GM did not grant the preference to all of its employees. However, the great majority of the other GM employees do not have the generalized production skills needed at Saturn. Most of these employees manufacture such auxiliary components as batteries and rubber hoses or perform no production work at all.

Admittedly, there are some non-UAW-represented employees who may have the generalized production skills needed at Saturn. Assuming arguendo that these employees have skills comparable to employees represented by the UAW, there is nothing presented by the Charging Party in this case or by the investigation of this case to show that GM unlawfully favored the UAW over the unions that represent these other employees. As shown, GM bargained and reached an accord with the UAW. There is nothing to suggest that GM violated its bargaining obligation to the other unions. 8/

7/ See Courier-Citizen Co. v. Local 11, 702 F.2d 273, 276 n. 4, 277-78 (1st Cir. 1983) (the court relied on similar reasoning to uphold an arbitration award enforcing a preferential hiring agreement between bargaining units of a single employer; the court rejected the contention that the preference illegally discriminated on the basis of union affiliation, noting that although it limited the pool of jobs and benefits available to others, "it is not clear that granting this sort of priority to jobs in the same company is unreasonable or inconsistent with sound labor policy").

8/ On May 12, 1986, the Pattern Makers League (PML) filed a charge against Saturn in Case 7-CA-25819. That charge is now under investigation. Thus, at this juncture, we do not know whether Saturn/GM unlawfully refused to bargain about, and /or unlawfully refused to grant, preferential hiring rights at Spring Hill for GM employees represented by PML. It may turn out, for example, that PML waived its rights to bargain (See International Harvester, 209 NLRB 357 (1974)), or that GM/Saturn had legitimate business reasons for not according preferential hiring rights to PML. Further, even

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Based on the above, we concluded that GM did not violate the Act by according preferential hiring rights at Saturn to its own employees who are represented by the UAW.

2. Premature Recognition

The Charging Party argues that GM recognized the UAW at an inappropriate time, i.e., before any employees were hired at Saturn. We conclude that, in the current circumstances, the argument has no merit.

In Kroger Co., 219 NLRB 388 (1978), the Board held that an employer could agree to grant recognition to a union at a future facility. In upholding this agreement, the Board said that it would assume the parties intended their agreement to be lawful and that it would read into the recognition agreement the condition that the union must in fact obtain majority status at the new facility. In the instant case, GM agreed to grant recognition to the UAW at Saturn, a future facility. Concededly, as in Kroger, there is nothing in the Saturn Agreement that expressly conditions recognition upon the UAW's attainment of majority status at Saturn. 9/ As noted supra, however, the Board will read into the agreement the condition that the UAW must achieve majority status. Hence, the Saturn Agreement is, in law, an agreement to recognize the UAW at Saturn, in futuro, if and when the UAW achieves majority support there. As construed by Kroger, the agreement is lawful. 10/

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assuming arguendo that we would find PML's charge to be wholly meritorious, that finding would not invalidate GM's agreement with UAW. Rather, such a finding would simply mean that, in our view, GM/Saturn must enter into "effects" bargaining with PML and must treat with PML in a nondiscriminatory way. Such bargaining could be meaningful, for, as noted supra, the Saturn Agreement does not grant all Saturn jobs to GM employees represented by the UAW.

9/ The agreement merely contains the prediction that the UAW will achieve majority status. Of necessity, there is no way that GM and the UAW can presently guarantee that the prediction will come to pass, inasmuch as this is dependent upon matters outside of the control of GM or the UAW, viz. (1) that UAW-represented employees will seek employment in sufficient numbers to constitute a majority of the Saturn workforce; and (2) that these employees will continue, at Saturn, to desire UAW representation.

10/ This is not to say that GM must withhold actual recognition until majority status is achieved among a representative complement of employees. To the contrary, if and when UAW obtains majority status among the employees initially hired at Saturn, GM could lawfully recognize the UAW. Such recognition would not automatically preclude a Board election. See Anaconda Co., 225 NLRB 453 (1976). See also General Extrusion Co., 121 NLRB 1165, 1167 (1958).

The fact that the Saturn Agreement is not a contract bar 11/ lends further support to this view. That is, the employees to be hired at Saturn can freely choose to be unrepresented or to be represented by some other union. Since the Agreement has no fixed term, such employees could petition to decertify the UAW or to select another union.

The current evidence is insufficient to establish that GM and UAW have acted at variance with the Kroger principles noted supra, i.e. that they have entered into a functioning collective bargaining relationship before any employees have begun working at Spring Hill. Thus, we need not pass on the issue of whether GM and UAW could do so.

That issue is not free from doubt. On the one hand, the recent case of Harte & Co., 278 NLRB No. 128 (1986) may suggest that GM and UAW could enter into a collective bargaining relationship now. In that case, an employer had a collective bargaining relationship with a union at one facility. When it decided to move and open a new facility, it recognized the union there. Significantly, the recognition occurred prior to the time when employees were hired and prior to the union's acquiring majority status. Indeed, the union never achieved majority status at the new plant. The Board nonetheless found that the recognition was lawful. In doing so, the Board noted that when the move was substantially completed the new workforce consisted of a substantial number of employees from the old plant. The Board further noted the good faith of the parties, the reasonableness of their actions, and considerations of national labor policy. With respect to the last factor, the Board noted that the agreement was achieved through good faith bargaining. The Board said that "national labor policy favors industrial stability achieved through the collective bargaining process." The Board further stated that the "parties responded admirably to a difficult situation with recognition of the economic realities involved. To say they acted illegally . . . would work a manifest injustice." Similarly, in the instant case, the parties engaged in good faith collective bargaining and responded, through collective bargaining, to a difficult situation posed by the "economic realities" of foreign competition.

Prehire recognition has also been approved in NLRB v. Burns, 406 U.S. 272, 294-295 (1972). Where a new employer takes over a unionized business and it is "perfectly clear" that the new employer "plans to retain" all or a sufficient number of the predecessor employees so that they will constitute a majority of the new employer's workforce, the new employer is privileged, and indeed obligated, to recognize the union as soon as it is apparent that the union will represent the workforce. This obligation arises whenever the intent to hire the predecessor employees becomes "perfectly clear", not necessarily only when there is actual hiring. Thus, it can arise before the workforce is hired.

11/ A contract, like the Saturn Agreement, with no fixed term is not considered a bar to any representation petition. Pacific Coast Association of Pulp and Paper, 121 NLRB 990, 993 (1958).

In the instant case, it is "perfectly clear" that GM "plans," and has agreed, to give a hiring preference to employees now in GM-UAW units, and there is a strong likelihood that these employees will constitute a majority of the employees at the new facility. In this regard, we note that the Employer has agreed to extend offers of employment so that a majority of the Saturn workforce will come from the ranks of its own employees who are now represented by the UAW. Second, it is highly likely that a sufficient number of UAW-represented employees will accept employment so as to constitute a majority of the workforce. GM presently has over 420,000 UAW-represented employees eligible to apply at Saturn, plus approximately 20,000 UAW-represented employees on layoff status who also may be qualified for Saturn jobs. The initial terms and conditions of employment specified in the Saturn Agreement are presumably favorable to such employees in that they preserve certain existing pension rights, and provide comparable wages with opportunities for productivity bonuses. Moreover, Saturn is apparently viewed by many GM employees as an experimental venture that could possibly be "the wave of the future" for the automobile industry and, consequently, worth getting into "on the ground floor." A GM-commissioned poll of a representative sample of skilled and operating technicians at two present GM facilities represented by the UAW revealed that from 114,000 to 145,250 General Motors skilled and unskilled workers would be willing to consider working for Saturn Corporation in Spring Hill, Tennessee. The UAW also indicates that it has received at least 500 unsolicited letters of interest from its members indicating their desire to transfer to Spring Hill. In these circumstances, the reasoning of Burns may permit GM to recognize the UAW at this time.

On the other hand, it can be argued that both Harte and Burns are distinguishable. The Harte case involved a relocation of an existing facility, and the new facility operated substantially the same as the old one. In the instant case, automobiles at the new facility will not be manufactured in the same way as they are at existing facilities. Similarly, in Burns, the new employer purchased a facility and operated it in the same manner and at the same place. The instant case involves a new and different operation and a new and different location.

As noted, we need not decide at this time whether the differences in Harte and Burns would call for a different result in the instant case if GM and UAW entered into a functioning collective bargaining relationship before UAW achieves majority status among employees working at Saturn. If they did so, a new charge could present that issue. 12/

12/ The PML charge discussed supra apparently contains an allegation that GM has granted exclusive recognition at Spring Hill to UAW, and thus declined to recognize PML there. As noted, the investigation of the instant charge does not support the allegation that GM is now recognizing UAW. If the investigation of the PML charge supports that allegation, we would be presented with the issue noted above.

In light of all of the above, the instant charges should be dismissed, absent withdrawal.

H. J. D.